Supreme Court, U.S.
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No. 98-1154

In the

Supreme Court of the United States

October Term, 1998

ABF FREIGHT SYSTEM, INC.,

Petitioner,

vs.

RICK WEBB,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this court should deny the petition because it seeks a rule of law that was not requested of the trial court?

II. Whether this court should deny the petition because there was substantial evidence of collusion between the employer and the union, and substantial evidence that each participated in the other's breach?

III. Whether this court should deny the petition because the employer tried to, and did, taint the grievance process with the presentation of fabricated physical evidence?

IV. Whether this court should deny the petition because it seeks to shift the burden almost totally away from the primary wrongdoer?

V. Whether this court should deny the petition because the district court did not foreclose use of the grievance date method of allocating damages, and the court of appeals said only that it was not required in every case?

VI. Whether this court should deny the petition because the petitioner is actually contesting the district court's refusal to allow a jury instruction that highlighted only a small portion of the evidence?

VII. Whether this court should deny the petition because the instruction sought by the petitioner was embodied within another instruction that the jury was given?

VIII. Whether this court should deny the petition because there has been no confusion within the courts of appeals regarding apportioning damages when there are multiple factors?

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RESPONDENT'S BRIEF IN OPPOSITION

Rick Webb (hereinafter "Webb"), by his undersigned counsel, respectfully opposes the petition for writ of certiorari to review the judgment of the court of appeals in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 155 F.3d 1230 and is set forth at App. A. 1a-35a.

JURISDICTION

Respondent accepts the jurisdictional statement in the Petition.

STATUTORY PROVISION INVOLVED

Respondent accepts the statutory statement in the Petition.

STATEMENT OF FACTS AND PROCEEDINGS

A. Facts of the Underlying Matter

Omitted or Misstated Facts

This is a fact-specific case in which the jury determined a myriad disputes within the evidence. These included pervasive issues of witness credibility, retaliation against a union steward for his union work, termination of a union steward for opposing the dispatch of illegal overweight trucks onto Colorado highways, and fabrication of physical evidence for use against the same union steward in grievance proceedings that followed his

firing. The jury's unanimous verdict was in favor of Webb. The court of appeals found no error and affirmed.

The instant petition is premised upon petitioner's request to the trial judge for a certain jury instruction, which jury instruction on its face did not preserve the issue that is now presented in the petition.

The instant petition also contains a misstatement of fact upon which the entire petition is premised, an assertion by the petitioner that "there has never been any allegation that the Company and the Union conspired with each other to deprive Webb of his rights or otherwise participated in the other's wrong." Pet. 22, n. 8.

The trial judge noted otherwise. Most of the case was premised upon overt collusion between the company and the union. After plaintiff's evidence was substantially presented before the jury, the trial judge stated that she would permit the issue of emotional damages to go to the jury because of evidence of the employer's fabrication of physical evidence in the grievance hearing, as well as collusion between the employer and the union. The trial judge summarized the plaintiff's case after much of the evidence was in, noting the evidence of collusion:

> TRIAL COURT: "If, indeed, the plaintiff's evidence is to be believed -- if the jury believes it -- that evidence was fabricated in this case; that there was some sort of agreements and plans between the union and the employer . . . ."

In sum, the petitioner's statement at Pet. 22, n. 8 is fatally undermined by an assessment of Webb's trial evidence by the trial judge herself.[1]

The petition omits numerous other pertinent facts of Webb's proof at trial, including the aforesaid evidence that the employer fabricated pivotal physical evidence to taint the grievance proceeding. Again, the trial judge noted the presentation of this evidence during trial, and it is not now necessary to delineate said evidence, fact by fact, for purposes of the instant petition. Said evidence was, as the trial court stated, appropriately in the jury's domain and weighty enough for jury consideration of what the trial court called "special damages" for "extreme and outrageous misconduct."

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[1] Petitioner inadvertently notes one of the motivations for the collusion between company and union against Webb, which was established at trial. Pet. 3, n. 1.

Petitioner's Requested Jury Instruction

Petitioner seeks a blanket rule of apportionment of damages that would require a trial court to instruct the jury that the union is responsible for all damages after the date that an untainted grievance proceeding should have been afforded the grievant.

However, this is not what the petitioner requested of the trial court. Petitioner (may also be referred to as "defendant") submitted a jury instruction labeled "No. 7" and made the following argument:

> DEFENDANT'S COUNSEL: "With regard to instruction No. 7 with regard to allocation, we request an instruction that the jury should be allowed to separate damages on the JWAC. Both the *Bowen* and *Aguinaga* cases that is an acceptable amendment for the jury to use, and they should be instructed they could use that."

The defendant's argument was incomprehensible. Additionally, no defendant's instruction No. 7 was placed in the record for the court of appeals to review. Defendant's counsel submitted only defendant's instruction Nos. 23, 28, 29, 32 and 36. Assuming *arguendo* that the referenced (but lost or withdrawn) instruction No. 7 set forth petitioner's now-espoused version of apportionment -- that the grievance hearing date is an absolute cut-off after which all damages become the union's responsibility -- even the petitioner's

counsel did not express such an extreme view to the trial court during the preparation of jury instructions. Instead, defendant's counsel argued that the jury should be instructed that it "could" use such a method of apportionment, as set forth above, not that it "must."

The only proposed jury instruction that the defendant's counsel made part of the record for appellate purposes on the issue of apportionment was its instruction No. 36:

> "You must separate from Rick Webb's damages the portion of those damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight System, Inc. from the increase in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb. You may separate these damages based upon the date of the Joint Western Area Conference Grievance Panel decision upholding Mr. Webb's discharge for failure to report an accident." Pet. 5-6, and App. A. at 37a.

Thus, the proffered instruction by the defendant contained the phrase "may separate these damages based upon the date" not "*must* separate these damages based upon the date." In sum, the defendant's proffered instruction would have made apportionment by that method merely optional or voluntary for the jury.

The apportionment instruction ultimately selected and given by the trial judge did not forbid use of such a method of apportionment based upon the date of the grievance hearing, nor did it forbid consideration of the grievance hearing date as a factor in apportioning damages. The jury was instructed:

> "You must apportion any award of damages between the employer and the union according to the damages caused by the fault of each. Damages attributable solely to the breach of the National Master Freight Agreement by ABF Freight Systems, Inc. should not be charged to Teamsters Local Union No. 17, and increases in those damages caused by Teamsters Local Union No. 17's failure to fairly represent Rick Webb should not be charged to the employer. The combined amount of these damages should make Rick Webb whole." Pet. 6, and App. A. at 36a.

Again, at no time did the trial court forbid the jury from using the date cutoff method of apportionment. What the trial court refused to do is highlight that single method or single factor within the jury instructions when requested to do so by the defendant (but requested merely as an optional or voluntary method not as a mandatory method).

The jury then apportioned Webb's damages. The employer was responsible for $89,699.20, the union $22,424.80.

B. Proceedings in the District Court

Respondent accepts the petitioner's discussion of proceedings in the trial court except as discussed *supra*, and as follows: the jury instruction conference was conducted by the trial court on July 16, 1996, and the trial court afforded opportunity for the parties to argue for and against jury instructions, and to proffer those sought. In its petition, the petitioner asserts that at the close of the trial, the petitioner "requested that the court instruct the jury that it must apportion Webb's back pay damages between the Company and the Union according to the date of the JWAC hearing." Pet. 5.

To the contrary, at the jury instruction conference the petitioner did not make any argument for "must" apportionment according to date but instead made the statement cited *supra* regarding (lost or withdrawn) instruction No. 7. But even counsel's statement or argument regarding instruction No. 7 did not ask for the "must" language but, at best, asked that the jury be instructed that it "could" use such an apportionment method if it wanted to. Thus, the petitioner's request was to make such a method optional or voluntary for the jury.

The petitioner did submit another instruction regarding apportionment -- instruction No. 36 -- but it only called for the "may" language, as discussed *supra*. Thus, again, the petitioner requested of the trial court only that the apportionment method by date be optional or voluntary for the jury, not that it be mandatory. Making it mandatory, a different argument altogether, is the basis of the petition brought now.

The issue of apportionment went to the jury on a special verdict form with the question: "What amount of the damages stated in answer 4 is attributable to the Union, and what amount is attributable to ABF Freight Systems, Inc.?"

The petitioner's attorney made no specific objection to this portion of the verdict form and said:

> "With respect to the special verdict form the way the questions are framed, we don't think accurately tracks the elements in the statute.
>
> "We also requested that the jury just be answering the questions without also being informed that they couldn't answer all the questions depending on the way they answered them. We would have requested that the Court merely asked them to answer the questions without any knowledge of the impact that would have on the Court's final judgment and then have the Court enter

> judgment in accordance with how they answered the questions.
>
> "Finally I think this may be being done; we wanted the allocation done separately for emotional distress."[2]

Thus, the petitioner's counsel did not object to the apportionment language in the special verdict form.

The trial court evidence also included substantial proof that the petitioner had corrupted the grievance procedure by actually fabricating false physical evidence against Webb. The manufactured evidence included presentation of an oversized and irrelevant tree limb as well as the rejuvenation of old damage on a trailer to make it look new and thus allegedly caused by Webb (to justify his firing). It was this "fabricated" evidence that the trial judge highlighted in plaintiff's case and in permitting a rare emotional distress instruction to go to the jury, as discussed *supra*.

Thus, if the jury believed the plaintiff's evidence, the company tried (in multiple ways) to corrupt and taint the grievance process.

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[2] This request by the petitioner was granted and the allocation instruction was repeated to the jury as to emotional distress. However, the jury did not award any emotional distress damages.

C. Proceedings in the Court of Appeals.

Respondent accepts the petitioner's discussion of proceedings in the court of appeals except as follows with pertinence to the issues of the petition:

The court of appeals stated that the union representative failed to call any witnesses for Webb during the grievance hearing and failed to obtain any of the documents that Webb had requested, breaching his promise to Webb. App. A. at 6a. The court of appeals stated that the union representative also failed to object when a damaged tree limb was characterized as being eight inches in diameter and about 30 feet long [*Id.*], and he generally failed to review the evidence [*Id.*].

The court of appeals noted the company's alleged tampering with evidence and, in a footnote, discussed some of it:

> The photographs presented at Webb's grievance hearing inexplicably show different kinds of damage to the top right corner of a trailer, with two photographs showing the running light on the trailer still present but a third photograph showing the running light missing." App. A. at 7a, n. 7.

The court of appeals stated that the union representative failed to present Webb's allegation of retaliation at the grievance hearing despite having been asked to, and despite the representative saying "we knew

this was coming." App. A. at 7a. Furthermore, the union representative apparently told Webb that it was not necessary for him to be present for the next grievance step in San Diego because no new testimony or evidence could be introduced. This was false. App. A. at 7a-7b. In San Diego the union representative stipulated to admission of the grossly oversized tree branch submitted by the company and also made the following statements undermining Webb's cause: "I'm not Mr. Webb so I don't know exactly what his position would be because he's not here to answer that personally. . . ." "I don't know why Mr. Webb did the things that he did at that time." App. A. at 8a.

The court of appeals also reiterated that a reasonable juror could have found that the union representative failed to present Webb's retaliation claim despite the union representative's belief that Webb's firing was retaliatory; that the union representative failed to follow regular practices for processing grievances; that the union representative affirmatively misled Webb regarding grievance procedures in San Diego; that the union representative affirmatively misled the grievance panel; that the union representative disparaged his own union member before the grievance panel; that the union representative contradicted Webb's own account of the incident "by accepting the company's claims as to the size of the tree limbs that Webb had hit." App. A. at 16a, n. 14.

The court of appeals found further that, "Indeed, [the union representative's] concessions allow a reasonable inference that Local 17 deliberately attempted to submarine Webb's case. . . ." App. A. at 21a.

The court of appeals was never given the opportunity to review petitioner's proposed (but lost or withdrawn) instruction No. 7, which may have been an apportionment instruction, as discussed above. Whatever that instruction said, it was not preserved in the record.

With regard to instructions that the district court did give to the jury, the petitioner argued that only two of them incorrectly stated the applicable law -- Nos. 10 and 17. App. A. at 33a. Neither of these instructions was the apportionment instruction selected by the trial court.[3] Neither of these instructions is pertinent to issues of the instant petition.

On the other hand, the petitioner did not object to the apportionment instruction selected by the district court, which is instruction No. 23. App. A. at 33a and 36a.

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[3] Instruction No. 10 set forth the elements of the union's breach of its duty of fair representation and had nothing to do with apportionment. Instruction No. 17 contained a further discussion of the union's breach of its duty of fair representation and, likewise, had nothing to do with apportionment. App. A. at 13a-13b, n. 13; 17a, n. 15; 33a-33b.

Instead, the petitioner submitted another instruction -- its own No. 36 -- which contained the additional concept that, "You may separate these damages based upon the date of the Joint Western Area Conference Grievance Panel decision upholding Mr. Webb's discharge for failure to report an accident." App. A. at 37a. Again, the verb was "may," not "must," and the court of appeals noted that petitioner's argument before the court of appeals was as follows:

> "ABF argues that its damages should have been capped as a matter of law to those wages that Webb lost prior to the grievance proceedings and that the district court erred in giving the jury its proportionate fault instruction." App. A. at 26a.

At the time of the jury instruction conference, however, the petitioner did not argue that "damages should have been capped as a matter of law." Instead, as discussed *supra*, the petitioner submitted an instruction that would have made such a method of calculation optional or voluntary for the jury ["may" separate the damages based upon the grievance hearing date]. App. A. at 37a. When given the opportunity to put objections on the record, the petitioner's counsel then argued orally only that the jury "should be instructed they *could* use that." [emphasis added]. Again, there was no request at the jury instruction conference that the damages be capped as a matter of law, only that the jury "could" use such a method of calculation if it wished to.

The instant petition is premised upon the desire for a requirement that an employer's damages must be capped as a matter of law as of the date of the grievance hearing.

The court of appeals disapproved petitioner's requested instruction No. 36.[4] It ruled:

"We have reviewed each of ABF's claims, and in each instance, the language proposed by ABF either was adequately conveyed by the instructions the court did give, constituted an incorrect statement of the law, or was without evidentiary support. Therefore we find no abuse of discretion." App. A. at 34a.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SEEKS A RULE OF LAW THAT WAS NOT REQUESTED OF THE TRIAL COURT.

At the jury instruction conference, the petitioner's counsel did not request an instruction requiring a mandatory cut-off of the employer's damages as of the date of the flawed grievance hearing. Instead, the petitioner's counsel requested only that the jury "may" or "could" use such a cut-off formula. That is a far cry

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[4] The court of appeals also disapproved four other instructions that petitioner submitted. They were unrelated to the issue of apportionment. App. A. at 34a.

from the absolute cut-off that petitioner now seeks as a matter of law.

Moreover, at the jury instruction conference, the petitioner's counsel did not object to the apportionment instruction that the trial judge did select to give to the jury. Instead, counsel provided only his own version of an apportionment instruction, which used the grievance date cut-off as an optional or voluntary consideration for the jury.

Granting the instant petition will rather grossly undermine trial court procedures employed by virtually every district court in the land. Jury instruction conferences, in which counsel are required to object and/or proffer their own instructions, would be obviated and counsel could thereafter bring up new instructions and new legal concepts for appellate purposes that were not addressed at the jury instruction conference.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE WAS SUBSTANTIAL EVIDENCE OF COLLUSION BETWEEN THE EMPLOYER AND THE UNION, AND SUBSTANTIAL EVIDENCE THAT EACH PARTICIPATED IN THE OTHER'S BREACH.

As the trial judge recognized, Webb's evidence was substantially premised upon collusion between the employer and the union. This was one of the reasons that the trial court permitted the issue of emotional distress damages to go to the jury, as discussed *supra*.

Petitioner has conceded that where an employer and union collude, or participate in each other's breach, it is appropriate not to apportion damages at all:

> PETITIONER: "Where the employer and union collude with each other in breaching a collective bargaining agreement and denying an employee the effective processing of a grievance, it is appropriate not to apportion damages at all, but instead to hold the union and employer jointly and severally liable." Pet. 22, n. 8.

There was indeed such evidence of collusion in the instant case -- as to all aspects of the grievance process, including the identification and presentation of evidence and argument -- that the trial court discussed it as something the jury could believe ("if the jury believes it").

Moreover, and as discussed *supra*, the same evidence confirmed that the employer and the union participated in each other's breach, particularly as to the identification and presentation of evidence during the grievance process, not to mention agreements reached before hearing for the union to not even examine the employer's fabricated physical evidence and to stipulate to its admission or exaggerated description. Additionally, the evidence of union agreement as to certain falsely damaging evidence against Webb was highlighted by the court of appeals. In sum, the court of appeals observed evidence that permitted the inference that the union "deliberately attempted to submarine Webb's case. . . ." App. A. at 21a. Most of that evidence was of acts committed in conjunction with the employer before and during the grievance process.

Indeed, as the trial court stated, there was evidence from which the jury could believe that "there was some sort of agreements and plans between the union and the employer," as discussed *supra*.

Thus, the instant case presented a classic fact pattern for joint and several liability, let alone apportionment in an 80-20 percent ratio. *See, Bowen v. United States Postal Service*, 642 F.2d 79 (4th Cir. 1981), *rev'd* 459 U.S. 212, 223, n. 11 (1983) (distinguishing those situations where "the union or the employer has participated in the other's breach"); *Vaca v. Sipes*, 386 U.S. 171, 197, n. 18 (1967) (obviating joint liability when the employer and union "played no part" or "took no part" in the other's breach); *Baskin v. Hawley*, 807 F.2d 1120, 1132 (2d Cir. 1986) (finding it appropriate to assess joint and several liability when an employer participated in the union's breach); *Allen v. Allied Plant Maintenance Co. of Tennessee, Inc.*, 881 F.2d 291, 298-99 (6th Cir. 1989) (joint and several liability is appropriate when an employer "has participated in the union's breach of duty . . . ."); *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440 (7th Cir. 1992) ("The rationale behind apportionment of damages disappears when each party plays an active role in the other's breach.")

Again, serious issue is taken with the petitioner's assertion of fact in the last sentence of Pet. 22, n. 8. To the contrary, Webb's evidentiary presentation was premised upon collusion between employer and union, and recognized by the trial court as such. Thus the instant case is, for that reason alone, inappropriate to establish a mandatory apportionment formula for all future cases throughout the land, as petitioner would wish.

III. THIS COURT SHOULD DENY THE PETITION BECAUSE THE EMPLOYER TRIED TO, AND DID, TAINT THE GRIEVANCE PROCESS WITH THE PRESENTATION OF FABRICATED PHYSICAL EVIDENCE.

Lest it be overlooked in this quest by the petitioner for blanket law, the facts themselves controlled almost everything that happened in this case. Indeed, the jury was entitled to believe (if it chose to) that the employer fabricated physical evidence and presented it in the grievance process. The trial court noted, "if the jury believes it -- that evidence was fabricated in this case." The court of appeals discussed certain aberrant evidence the employer presented in the grievance process. App. A. at 6a and 7a, n. 7. And the court of appeals stated, "Because of the jury's verdict in favor of the appellee, our review of the evidence is presented here in the light most favorable to the appellee." App. A. at 2a, n. 1.

Now the petitioner seeks to have its liability cut off absolutely, totally, and automatically as of the date of the very grievance hearing that it tainted with fabricated physical evidence. Under these facts, such a rule of law would be incongruous at best. At worst, it would directly reward the wrongdoer and undermine grievance proceedings nationwide.

IV. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SEEKS TO SHIFT THE BURDEN ALMOST TOTALLY AWAY FROM THE PRIMARY WRONGDOER.

The petitioner's argument is that, as a matter of law, its obligation for damages should have been cut off as of the date of the flawed grievance hearing. Thus, the petitioner would have been responsible for only a tiny fraction of Webb's damages.

Such a rule of law would assure that in most cases the primary wrongdoer, the employer who fired the employee for bogus or retaliatory reasons in the first place, would escape liability for all but a small portion of the damages.

As the court of appeals wrote, a proportionate fault system of allocating damages "ensures that the 'primary wrongdoer' shoulders an appropriate burden, especially when an allocation of damages based on the grievance date would shift a disproportionate amount of damages onto the party that was less at fault." App. A. at 27a.

One can imagine the potential upheaval in organized labor if employers understood as a matter of law that they could terminate a union member for false, extra-contractual or retaliatory reasons, knowing that the employers' damages would be quickly capped -- capped no matter what -- a mere few weeks later, at the time of the grievance hearing.

Thus, the decision of the court of appeals evinced both common sense and sound public policy.

V. THIS COURT SHOULD DENY THE PETITION BECAUSE THE DISTRICT COURT DID NOT FORECLOSE USE OF THE GRIEVANCE DATE METHOD OF ALLOCATING DAMAGES, AND THE COURT OF APPEALS SAID ONLY THAT IT WAS NOT REQUIRED IN EVERY CASE.

In quoting its own decision in *Aguinaga v. United Food & Commercial Workers International Union*, 720 F. Supp. 862 (D. Kans. 1989), *aff'd in part, rev'd in part*, 993 F.2d 1463, 1477 (10th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994), the court of appeals stated in the instant case that the hypothetical grievance date method of allocating damages "is not required in every hybrid case . . . ." App. A. at 27a.

This is a far cry from forbidding its use altogether -- or forbidding it at all -- which the court of appeals did not do. The petitioner now seeks to seize said decision to establish the converse, i.e. that the grievance date method must be used in every case as a matter of law.[5]

Moreover, the district court did not forbid the jury from considering -- or the attorneys from arguing -- the grievance cut-off as either a method of apportionment or as a factor in apportionment. All the trial court did was decline to read an instruction that the jury "may" consider the grievance cut-off in its apportionment. This was the only instruction submitted on the issue by the petitioner

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[5] And petitioner seeks such a result even in this case involving collusion and tainted grievance proceedings -- seeking universal application of the date cut-off method of apportionment.

and preserved in the record (instruction No. 36). App. A. at 33a-34a and 37a.

Thus, the axiom that the grievance date method need not be used in every fact pattern is established in the instant case, just as it was in *Aguinaga, supra.*

As a writ of certiorari was denied in *Aguinaga,* 510 U.S. 1072, so should it be denied herein.

VI. THIS COURT SHOULD DENY THE PETITION BECAUSE THE PETITIONER IS ACTUALLY CONTESTING THE DISTRICT COURT'S REFUSAL TO ALLOW A JURY INSTRUCTION THAT HIGHLIGHTED ONLY A SMALL PORTION OF THE EVIDENCE.

While the petitioner now seeks a blanket rule that the grievance cut-off method of apportionment must be used in every case as a matter of law, that is not what the petitioner asked of the trial court. Instead, as discussed *supra*, the petitioner merely asked for an instruction that the jury "may" consider the cut-off date -- not that it "must." App. A. at 37a.

As such, the last sentence in the petitioner's submitted but refused instruction No. 36 would have had no more nor less effect than to call attention to a small portion of the evidence bearing on apportionment. Calling attention to only one item of evidence on the issue of apportionment might have had the effect of confusing the jury and shifting its attention from other weighty evidence

of the employer's persistent and palpable wrongdoing, i.e. away from other multiple factors supporting a larger apportionment of damages against the employer.

At best, a court's advising a jury as to evidentiary matters is discretionary. *Nudd v. Burrows*, 91 U.S. 426, 439 (1875). Thus, the trial court in this case did not abuse its discretion in refusing to highlight just one factor in apportioning damages, namely the grievance hearing date. At worst, advising a jury as to the scope of the evidence, its impact or calling attention to a particular item of evidence is error. *Young v. Godbe*, 82 U.S. 562, 565 (1872).

Indeed, the instruction requested by petitioner (instruction No. 36) would have been misleading unless it had said that the jury could consider the grievance date "among other factors" in its apportionment of damages. The petitioner did not request that of the trial court. It is axiomatic that a jury instruction that is misleading is thus properly refused. *U.S. v. Jones*, 33 U.S. 399, 415-16 (1834); *Winn v. Patterson*, 34 U.S. 663, 679 (1829).

A party is not entitled to such an instruction that assumes the existence of a fact that is actually an issue to be determined by the jury. *Winn, supra,* at 678-79.

VII. THIS COURT SHOULD DENY THE PETITION BECAUSE THE INSTRUCTION SOUGHT BY THE PETITIONER WAS EMBODIED WITHIN ANOTHER INSTRUCTION THAT THE JURY WAS GIVEN.

It is also axiomatic that there is no need to give a jury instruction that is already embodied in another instruction. *Insurance Co. v. Baring Bros. & Co.*, 87 U.S. 159, 161 (1873). In the instant case, the trial court gave an instruction to the jury that permitted it to apportion damages "between the employer and the union according to the damages caused by the fault of each." App. A. at 36a. Moreover, the trial court's instruction required that damages attributable to the union "should not be charged to the employer." *Id.*

Thus, the instruction given the jury embodied the very concept that the petitioner sought in its refused instruction No. 36, namely that the employer not be charged with damages attributable to the union. App. A. at 37a.

Finally, the instruction requested by the petitioner but refused, Instruction No. 36, would have been a misstatement of the law, because it would have denied the jury's right to apportion damages based upon other factors, including the collusion between employer and union in the case, as discussed *supra*, and the employer's tainting of the grievance proceeding itself with the introduction of faked physical evidence.[6] A requested

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[6] Given the employer's tainting of the grievance process, with evidence thereof viewed in a light most favorable to Webb and unfavorable to the employer, the employer did

instruction cannot leave out of view other evidence that the jury may consider on an issue. Refusing such a one-sided instruction is not error. *Smith v. Condry*, 42 U.S. 28, 35 (1843).

VIII. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE HAS BEEN NO CONFUSION WITHIN THE COURTS OF APPEALS REGARDING APPORTIONING DAMAGES WHEN THERE ARE MULTIPLE FACTORS.

Again, the petitioner seeks a decision that the grievance hearing date *ipso facto* cuts off an employer's liability and does so as a matter of law. The courts of appeals, including the court of appeals in both the instant case and in *Aguinaga*, *supra*, have consistently ruled that the grievance hearing date is one factor to be weighed, but certainly not the only one in all cases. In those rare cases where the grievance date appeared to serve as a cut-off for the employer's damages, said decisions were evidence-specific and fact-limited.

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not prove at trial that the grievance process would have ended Webb's damages. With the employer's use of fabricated physical evidence, there is no assurance that Webb would have prevailed in the grievance hearing even with proper union representation. Thus, his damages would have continued past the grievance hearing, having still been caused either solely or primarily by the wrongful conduct of the employer.

Contrary to petitioner's suggestion, *Bowen* v. *United States Postal Service*, 642 F.2d 79 (4th Cir. 1981), *rev'd*, 459 U.S. 212 (1983) did not mandate the ignorance of all other factors bearing on the issue of apportionment. Indeed, the court did not decide at all whether the district court's instructions on apportionment of damages were proper. *Bowen*, 459 U.S. at 230, n. 19. The court added: "Nor is it necessary in this case to consider whether there were degrees of fault, as both the Service and the Union were found to have acted in 'reckless and callous disregard of [Bowen's] rights'." *Id.*

Said footnote not only obviated much of the dissent in *Bowen* but eliminates said decision altogether as any kind of polestar for the sweeping and exclusive rule of law that petitioner seeks now. In *Bowen*, the court simply did not say that a grievance hearing date is *ipso facto* the damage cut-off point for the employer in all cases. After *Bowen*, the courts of appeals were certainly free to use such a factor or to assess degrees of fault in some other fashion, or in some combined fashion, based upon the realities of a given case.

This is precisely why the court of appeals in the instant case wrote, in citing *Aguinaga, supra*, that apportionment of damages premised upon the grievance hearing date "is not required in every hybrid case . . . ." App. A. at 27a.

Indeed, such a rule cutting off an employer's damages *ipso facto* because of the occurrence of a grievance hearing flies in the face of common sense, fairness and traditional notions of causation. It would be like absolving a drunk driver of responsibility for the suffering and ensuing death of the pedestrian he hit with his car solely because the ambulance got there late.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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